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No. 64-*35*

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960.

THE FEDERAL LAND BANK OF WICHITA, *Petitioner*,
v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF
KIOWA, STATE OF KANSAS, ET AL., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KANSAS

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 614

THE FEDERAL LAND BANK OF WICHITA, Petitioner

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF KIOWA, STATE
OF KANSAS, BEN H. PAXTON, Sheriff; ALICE CRONIC, County Treas-
urer; EUNICE RICH, Clerk of the District Court; and THE STATE
OF KANSAS, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KANSAS

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the petitioner's personal property here involved enjoys express or implied immunity from state taxation where the property is held for a purpose not connected with, nor furtherance of, the federal governmental functions delegated to petitioner by the Federal Farm Loan Act of July 17, 1916, but instead is held for a purpose wholly unrelated to and outside the scope of its statutory functions.

STATEMENT OF THE CASE

The facts are essentially set out in the opinion of the Kansas Supreme Court (187 Kan. 148), which is printed as Appendix A to the petition for the writ.

In 1922 the petitioner bank made a farm mortgage loan of \$3,000 in the usual course of its money-lending function upon a certain tract of land in Kiowa County, Kansas. In 1941 the loan became in default, the mortgage was foreclosed, and title to the real estate was acquired by the bank in order to protect its interest as mortgagor. In 1942 the petitioner entered into a contract for a deed with Richard P. Janson, the present owner of the property, and on August 8, 1946, conveyed the property to him for a total consideration of \$3,500.00. However, the deed reserved an undivided one-half interest in the mineral estate underlying the tract for a period of twenty years and for so long thereafter as minerals were produced on the premises or were being developed or operated.¹

The trial court found from undisputed evidence that when the petitioner conveyed the tract to Janson in 1946 it had fully recouped any financial loss suffered by reason of the mortgage foreclosure.² No evidence was offered by

1. Under Kansas law, real property may be horizontally "severed" so as to create a surface estate and a subsurface or mineral estate. (*Shaffer v. Kansas Farmers Union Royalty Co.*, 146 Kan. 84, 69 P. 2d 4.)

2. The detailed findings of fact made by the trial court were set out in full in the opinion of the Kansas Supreme Court. (See Appendix A to the petition for the writ, pp. A6-A9.)

petitioner as to its purpose in retaining this particular mineral estate other than a general resolution of its Board of Directors authorizing it "to reserve an interest in minerals or mineral rights in connection with sales of its acquired real estate *in order to realize as much as possible from such sales.*"³

In 1946 when the petitioner retained its mineral estate, there was no mineral production or immediate prospect thereof on the premises or on farm lands in the vicinity. Nine years later a pool of gas was discovered in the area, petitioner granted an oil and gas lease on its property, a gas well was drilled on adjacent property, and petitioner's mineral estate was unitized for production purposes with that well. In 1957 petitioner received its first royalty payment under this lease, which royalty payment was assessed for personal property tax by Kiowa County. That assessment forms the subject matter of this lawsuit.⁴

The petitioner filed suit in the District Court of Kiowa County, Kansas, to enjoin collection of the tax, the in-

3. Petition, Appendix A, page A7. (Emphasis supplied.) This resolution was adopted pursuant to a regulation of the Farm Credit Administration which granted approval to land banks to hold mineral and mineral rights for periods in excess of five years, "when in the banks opinion it is in the banks interest to do so." (Petition, Appendix A, page A7.)

4. Up to the time of the trial in March, 1959, the petitioner had derived a total of \$2,017.20 in royalties under this lease and, in addition, had received \$980.00 in rents and bonuses under this lease and a previous lease granted in 1944. The petitioner was found to have expended a total of \$33.15 in real property taxes upon its mineral interest during the period from 1947 through 1958.

junction was denied and petitioner appealed to the Kansas Supreme Court where the trial court's judgment was affirmed by the opinion set forth in Appendix A to the petition for the writ.

**ARGUMENT
REASONS FOR DENYING THE WRIT**

I.

**THE DECISION BELOW DOES NOT CONFLICT WITH
PREVIOUS DECISIONS OF THIS COURT**

The fundamental issue presented by this case is whether immunity from state taxation extends to property of a federal instrumentality which is not held in furtherance of the statutory functions of that instrumentality, but instead is being held for a purpose wholly unrelated to and outside the scope of such functions. The issue here is not, as suggested by petitioner,⁵ whether *all* mineral interests owned by federal land banks are, *per se*, held beyond the authority of such instrumentalities. A differentiation must be made as to whether ownership of a particular mineral estate is an incident to one of the delegated functions of the bank. The decision of the court below makes this necessary distinction:

"One of the primary functions of the bank is to extend credit to persons engaged in agriculture and to make loans on the security of real-estate mort-

5. Petition, pp. 8, 9.

gages. The acquisition and holding of real estate is a mere incident to its money-lending functions and is authorized only when it is a necessary incident to those functions."⁶

The decision of the Kansas Supreme Court specifically rested upon the finding that the holding of this property under the particular fact situation found to exist in this case was *not* incidental to the performance of petitioner's statutory functions:

" . . . (T)he property here involved . . . is not being held and used in furtherance of a federal purpose."⁷

Thus limited, the decision below does not represent a threat or challenge to the doctrine of express or implied immunity from state taxation of the instrumentalities employed by the United States to carry out its delegated powers.

The decision below does not conflict with previous decisions of this Court. It is entirely consistent with the reasoning of previous decisions of this Court concerning immunity of federal instrumentalities from state taxation. The issue of this case does not appear to have been heretofore decided by this Court.

Certainly the decision below is not in conflict with *Federal Land Bank v. Bismarck Lumber Company*, 314 U. S.

6. Petition, Appendix A, pp. A 15, A 16.

7. Petition, Appendix A, p. A 16.

95, as suggested by the petition and by the memorandum for the United States.⁸ The *Bismarck* case concerned an attempt to divide the federal functions of land banks into two categories, governmental and proprietary, and then declare the proprietary federal function (in that case, the money-lending function) to be subject to state taxation. The *Bismarck* decision has no application to this case as there is no federal function here involved. In *Bismarck* this Court held that federal instrumentalities do not engage in proprietary but only in governmental functions. The decision below is consistent with *Bismarck* as this decision held that the petitioner was not here "engaged in the furtherance of its governmental function."⁹

The decision below is said to be based on an argument presented, but rejected, in *Smith v. Kansas City Title and Trust Company*, 255 U. S. 180.¹⁰ But the *Smith* case involved two points which are *not* at issue here, namely, the power of Congress to create land banks and the power of Congress to extend immunity from state taxation to activities in furtherance of their statutory functions. The decision below does not conflict with either of these two points.

8. Petition, pp. 8, 9; Memorandum, pp. 2, 3.

9. Petition, Appendix A, p. A 16.

10. Memorandum, p. 3.

The statement from *Federal Land Bank v. Priddy*, 295 U. S. 229, cited in the memorandum for the United States¹¹ points out that the banks are organized, in part at least, for profit, but this statement has specific reference to the fact that section 5 of the Federal Farm Loan Act authorizes a dividend to be paid. The money-lending functions of petitioner may, of course, yield a profit after expenses, and this section of the Act merely permits a disbursement of such profit in the form of a dividend to the stockholders.

However, the memorandum appears to suggest that the dividend feature of the Act empowers land banks to go outside their statutory functions and engage in any enterprise or activity which might produce a profit (i. e., dividend). However, this Court has denied the existence of a power on the part of the federally created banks to engage in profit making activities which are not incidental to nor within the scope of their statutory functions.¹² The profit referred to in the *Priddy* case must of necessity be that profit realized from the exercise of the statutory functions of the bank. The *Priddy* case simply points out that some of the money derived from the exercise of those statutory functions is paid into private hands in the form of a dividend.

11. Memorandum, p. 3.

12. *First National Bank v. Converse*, 200 U. S. 425, 438, 439.

II.

THE DECISION BELOW IS CORRECT

The reason for immunizing a federal instrumentality from state taxation is to protect the functions of government which have been delegated to that instrumentality:

"The exercise of such taxing power by the states might be so used as to hamper and destroy the exercise of authority conferred by Congress, *and this justifies the exemption.*"¹³ (Emphasis supplied.)

Where a federal instrumentality holds property not in furtherance of its statutory functions but for a purpose wholly outside the scope of those functions, the reason for tax immunity *ceases to apply*, as no federal function could be hampered by taxing such property. The decision below so held:

" . . . Under the facts before us, how does the imposition of this personal property tax impede or interfere with the legitimate function of the federal instrumentality involved? It does not—and when the reason for the rule of tax immunity, namely, the protection of functions of government —fails, the rule fails."¹⁴

When Congress delegated certain functions to land banks and immunized those functions from state taxation, manifestly it intended the tax immunity thereby granted to protect only those functions thus validly authorized. In Fed-

13. *Smith v. Kansas City Title and Trust Co.*, 255 U. S. 180, 213.

14. Petition, Appendix A, p. A 16.

eral Land Bank v. Bismarck Lumber Company, 314 U. S. 95, this Court said:

“We have held on three occasions that Congress has authority to prescribe tax immunity for *activities connected with, or in furtherance of*, the lending functions of federal credit agencies. (l. c. 103.) (Emphasis supplied.)

And in *Pittman v. Home Owners' Loan Corporation*, 308 U. S. 21, in commenting on the tax immunity granted by Congress to federally created corporations, this Court said:

“Congress has not only the power to create a corporation to facilitate the performance of governmental functions but has the power to protect the *operations thus validly authorized.*” (l. c. 32, 33) (Emphasis supplied.)

This court has many times held that federal instrumentalities possess only those powers that are expressly or impliedly granted them by Congress.¹⁵ This court has also held that ownership of property which is not incidental to the exercise of those delegated powers is impliedly prohibited to a federal instrumentality.¹⁶ Federally created banks may hold a certain type of property which, under one set of circumstances, is a proper incident to its money-lending function but under different circumstances the holding of the same property may be impliedly prohib-

15. *Stark v. Wickard*, 310 U. S. 288; *Federal Trade Commission v. Eastman Kodak Co.*, 283 U. S. 645; *California National Bank v. Kennedy*, 187 U. S. 362.

16. *First National Bank v. Converse*, 200 U. S. 425.

ited.¹⁷ And, even though a bank lawfully acquires property to protect its debt subsequent events may convert the ownership into one beyond its powers.¹⁸ Here the petitioner lawfully acquired the property to protect its debt, located a buyer and sold it for a consideration wholly adequate to recoup its loss. But instead of bargaining and selling the entire tract in 1946, it held out of the bargain one-half of the mineral estate for the stated purpose of realizing "as much as possible from the sale."¹⁹ Frankly speaking, the petitioner thereupon entered the oil and gas business, speculating that there would some day be oil and gas production in the area and retaining this real property mineral estate in order to participate in such future mineral development. The question remains, was this continued real property ownership within the express or implied powers of the petitioner?

Title 12, United States Code, § 781 Fourth (b), the basis of petitioner's power to acquire and hold real property, expressly provides that it may acquire same:

17. *First National Bank v. Concourse*, *supra*: "To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as security for a pre-existing debt does not imply that, because a national bank has lent money to a corporation, it may become an organizer and take stock in a new and speculative venture." (I. c. 439.)

18. *Birdsell Manufacturing Co. v. Anderson*, 104 Fed. 2d 340, 342 (6th Cir., 1939).

19. Petition, Appendix A, page A7. It is unclear how its failure to offer and sell the entire tract enabled the petitioner "to realize as much as possible from the sale." (Emphasis supplied.)

" . . . *in satisfaction of debts* or purchased at sales under judgments, decrees, or mortgages held by it. . . ." (Emphasis supplied.)

The petitioner's authority to acquire and hold real property is therefore circumscribed by this section. This section must be read in connection with the other delegated powers of the bank enumerated in Title 12, § 641, *et seq.* The primary purpose for which the petitioner was created was to provide a rural credit system to extend credit to persons engaged in agriculture.²⁰ An examination of the statutes under which the petitioner was created discloses that one of its primary functions is that of lending money on the security of real property mortgages. The acquisition and holding of real property is, therefore, a mere incident to its money-lending function and should at all times be considered in light of this function. In other words, it was not the design or intent of Congress that the Federal Land Bank would acquire or hold real property interests for speculation and profit unrelated to statutory functions. The petitioner was not intended by Congress to become the proprietor of mineral estates simply for the sake of owning property. A reading of the entire Federal Farm Loan Act discloses that the acquisition and holding of real property is proper only when it is an incident to the Bank's

20. *Federal Land Bank v. Gaines*, 290 U. S. 247, 250.

money-lending function and necessary for the protection of the debt and recoupment of any losses suffered by reason of foreclosure of the property.²¹

Section 26 of the Federal Farm Loan Act (12 U. S. C. §§ 931-933) grants immunity from state taxation to the personal property of federal land banks. It would appear virtually axiomatic that Congress intended this tax immunity for personal property to protect only property used in furtherance of those functions "validly authorized" in the other sections of the Act. Conversely stated, Congress cannot be said to have intended that activities impliedly prohibited to land banks be clothed with tax immunity. Nor can any cogent reason be advanced for finding that implied constitutional immunity from state taxation extends to such non-governmental activities carried on by federal land banks.

This construction of the legislative intent of Congress forms the basis upon which the decision below rested:

"We believe that the Congress, in enacting the exemption provision of Sec. 931, above, intended that the tax immunity there provided should apply only when the bank is engaged in the furtherance of its governmental function." (Emphasis supplied.)²²

21. It is significant that petitioner has not sought to relate its retention of this mineral estate to any of its statutory functions.

22. Petition, appendix A, p. A16.

This point was not directly raised, discussed nor decided in the several cases cited in the petition for the writ and in the memorandum for the United States.

The memorandum for the United States points out that it is for Congress to determine the extent of the tax immunity enjoyed by federal instrumentalities;²³ the decision below is in complete accord with this view as illustrated by the preceding quote from the decision of the Kansas Supreme Court.

It is argued that the decision below "implies" a power in state authorities to "exercise supervisory jurisdiction over the activities of a federal instrumentality."²⁴ But the decision below does not purport to control in any manner the activities of the petitioner; it does not purport to divest nor does it force petitioner to divest itself of the ownership of the property; it does not enjoin petitioner from continuing to lease the mineral estate and receive royalties; and the opinion below recognizes that petitioner owns the property—the tax assessment is based upon that ownership.

Courts are not denied the power to determine the question of whether a federal instrumentality holds property outside the scope of its statutory authority.²⁵ The case cited in the memorandum for the United States in support

23. Memorandum, p. 4.

24. Memorandum, p. 4.

25. *First National Bank v. Converse*, 200 U. S. 425.

of its argument does not deny the power of courts to determine the scope of the power possessed by federal instrumentalities; instead it affirms the existence of such power:

"This is not to say that there may be no judicial checks to arbitrary and capricious action on the part of the bank, to proceedings in violation of law or tainted with fraud. . . ." (*Greene County Nat. F. L. Ass'n vs. Federal Land Bank*, 152 F. 2d 215, 220, cited at page 4 of the memorandum.)

However, it should be pointed out again that the decision below does not purport to control the land bank's ownership of this or any other property. A corporation may hold legal title to property even though such holding is beyond its statutory power.²⁶

The memorandum for the United States also points out that "the court below cites no authority" to support its conclusion on the issue of this case.²⁷ The memorandum fails to record, however, that the authorities cited in the memorandum and in the petition do not support a contrary conclusion. Previous decisions of this Court do not appear to have decided the point; no decisions of lower federal courts have been found in point. In *Central*

26. "A corporation has no right or authority to do acts which are not within the powers conferred upon it by the legislature, but, as in the case of an individual, it is possible for it to do wrong. It may exceed its powers and do an ultra vires act. . . . A conveyance or transfer of property to . . . a corporation may transfer the title, though the corporation has no power under its charter to hold . . . the property." (*Fletcher's Cyclopedia of Corporations*, Vol. 7, sec. 3424.) (Emphasis supplied.)

27. Memorandum, p. 4.

Methodist Church v. City of Meriden, 126 Miss. 780, 89 So. 650, a state statute exempted from taxation "all property" belonging to a religious society. A second statute limited the amount of real property that a religious society might own. The church acquired property in excess of its authority and resisted an attempt to tax it on the grounds that *all* of its property was exempt by statute. But the Mississippi Supreme Court held otherwise:

"We think this principle is sound; that it never was the purpose of the Legislature to exempt from taxation any more property than a religious society could lawfully hold." (l. c. 652.)

We think the principle of this decision is sound. The petitioner advances no argument or authority to justify immunity from state taxation for its property not held in furtherance of its governmental purpose. The decision below is limited in application to such property, and does not authorize state taxation of governmental functions. The decision below is consistent with the reasoning and purpose which underlies the doctrine of governmental tax immunity as explained in previous decisions of this court.

CONCLUSION

The issue of this case concerns itself with property of a federal instrumentality which is not held in furtherance of a governmental function, but instead is held for a purpose wholly unrelated to the statutory functions of the instrumentality. The decision below is not in conflict with previous decisions of this Court concerning governmental tax immunity and is, in fact, consistent with reasoning of those decisions. The decision below is correct in concluding that Congress, in granting tax immunity from state taxation to personal property of land banks, intended to immunize *only* that property held or used in furtherance of the statutory functions of land banks. Respondents respectfully move that the petition for a writ of certiorari to review the judgment of the Kansas Supreme Court be denied.

Respectfully submitted,

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